No. 3422

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK H. SCHURMANN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

C. H. McBRIDE,
Honolulu, T. H.,
Attorney for Appellant.

S. JOSEPH THEISEN,
San Francisco, California.
Of Counsel.

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Aside from quoting the opinion of the lower court, which we shall discuss presently, and the unsupported opinion of a *nisi prius* court in the *Wursterbarth* case, which we fully answered in our opening brief (pp. 26-28), the greater portion of the District Attorney's brief is devoted to general propositions against which we have made no contentions. We have in no way disputed the duty of the District Attorney to institute proceedings for the concellation of naturalization in proper cases. Nor have we raised any question as to the constitutionality of that portion of the Act which provides for the cancellation of certificates issued before, as well as

after, the passage of the act. On the contrary, we conceded (p. 29) that a certificate of citizenship does not confer a vested property right so as to prevent the subsequent enactment of provisions for its revocation for causes existing at the time of the issuance of the certificate.

We did show, by ample authority, that the certificate of naturalization is a judgment, with its intendments of finality. We conceded (p. 15) that, as regards certificates fraudulently or illegally procured, their unimpeachability has been somewhat modified by section 15 of the Act, citing the *Johannessen* case. But we contended, and now contend, that this section cannot be extended beyond its express provisions, and that, except as thus specifically provided, the finality of a certificate of naturalization still exists with like effect as before the passage of the Act. It follows that a certificate of naturalization, once granted, cannot be canceled except for fraud or illegality in its procurement shown *by competent evidence to have existed at the time of the issuance of the certificate.*

> "The ordinary presumptions and rules of evidence are not reversed in suits to cancel certificates of citizenship."
>
> *U. S. v. Deans*, 230 Fed. 957; 145 C. C. A. 151.

THE INSUFFICIENCY OF THE BILL.

The reply of the District Attorney confirms, rather than refutes, our claims as to the insufficiency

of the petition. He concedes that "*facts* must be shown in the bill sufficient to enable the court to judge whether the certificate was fraudulently obtained," and that the bill must be supported by an affidavit "showing good cause therefor." Now where are the "facts", claimed to have taken place in 1904, set forth? And where does the "good cause" appear? He overlooks the elements always essential in pleading fraud in ordinary cases, namely, that the specific facts showing fraud must be definitely pleaded. It is not sufficient to plead conclusions, as, for instance, to plead that an act was fraudulently done, or that there was lack of good faith. The precise facts must be pleaded. The Congress must be presumed to have known this elementary doctrine. Yet so careful and considerate was the Congress to guard against the harassing of our adopted citizens in times of national stress or feeling by vexatious proceedings that it required, in addition to the otherwise essential averments of specific facts, an affidavit showing "good cause". We repeat, where, aside from the averment of conclusions, are the "facts" set forth? And where is the "good cause", the fraud, existing *at the time of the issuance of the certificate,* shown? Utterly failing to aver any specific facts committed in 1904, the bill and the affidavit are clearly insufficient (*U. S. v. Norsch,* 42 Fed. 417; *U. S. v. Salomon,* 231 Fed. 928; 146 C. C. A. 124), in the latter case the court saying:

> "We think it manifest that it was intended that the required affidavit should state facts

constituting 'good cause' for instituting the proceeding."

THE INSUFFICIENCY OF THE EVIDENCE.

But let us come to the main proposition, the really decisive point, the insufficiency of the evidence to justify the decision. The District Attorney concedes that "*facts* must be shown by the bill sufficient to enable the court to judge whether or not the certificate was fraudulently obtained". It follows that such facts must also be proven, and that they must be proven by means of the established rules of evidence. Now how did the District Attorney try to prove the alleged facts, the "facts" (constituting fraud) alleged by him to have been committed in 1904, at the time of the naturalization?

He says (p. 13) that "facts occurring *at any time* may be taken as evidence of fraud if from them fraud may reasonably be presumed". With no foundation therefor other than this *ipse dixit,* he endeavors to prove the supposed "facts"—the fraud alleged to have been committed in 1904—*solely and only by means of inference* from the attempted proof of an alleged lack of allegiance to the United States claimed to exist twelve to fourteen years later, which latter condition is in turn sought to be *inferred* from proof of declarations alleged to have been made in the years 1916 to 1917. Or, reversing the operation, the District Attorney produces evidence that in the years 1916 to 1917 the appellant wrote a book and made certain oral decla-

rations of opinions as to the justice or injustice of the cause of certain of the foreign belligerents. Therefrom he seeks to draw an inference that this proves a present existing lack of allegiance to the United States; in other words, an inference that the appellant is guilty of treason to his adopted country. From this inference he seeks in turn to draw another inference, namely, that this standing by itself proves that the same condition of lack of allegiance existed twelve to fourteen years previously, and of itself proves that appellant did not then mean what he said and committed perjury in taking the oath of allegiance.

Such is the position of the District Attorney. He argues (p. 10): "The *acts* of appellant proved to have been committed in the years 1914* to 1917 * * * cannot be taken but *showing* [an inference] * * * a [now existing] want of allegiance to the United States," and from this alone, with nothing else to support it, he argues [another inference] that "it is impossible to believe otherwise than that his oath of allegiance [taken in 1904] was not made in good faith". The conclusion of the lower court is based upon similar premises.

Passing for a moment the question of the burden of proof, we will show that the attempted proof by such inferences directly violates three cardinal rules of evidence, first, that presumptions do not run back-

*This date is erroneous. Appellant's book was published in 1916 (Tr. p. 45). This naturally aroused against him the enmity of the British colony in Honolulu (Tr. pp. 351-7) and was the commencement of his troubles.

ward; second, that an inference cannot be founded upon an inference; and third, that where inferences or presumptions conflict, the presumption of lawful intent and innocence of crime, fraud or wrong—the strongest presumption in the law—controls.

PRESUMPTIONS DO NOT RUN BACKWARD.

The District Attorney cites only the unsupported *Wursterbarth* case in support of his assertion (p. 13) that facts occurring *"at any time"* may be taken as evidence of fraud if from them fraud may reasonably be presumed. This assertion ignores two elementary principles of evidence, namely, that the facts must not be too remote, and that presumptions do not run backward. The latter of these two principles will suffice here. It also demonstrates the former. The quotation already made from *U. S. v. Deans, supra,* is especially applicable:

> "The ordinary presumptions and rules of evidence are not reversed in suits to cancel certificates of citizenship."

In *W. F. Corbin & Co. v. U. S.,* 181 Fed. 296, 104 C. C. A. 278, the court says:

> "We do not understand the rule of presumptive evidence to be that if and when the existence of a given condition is proven, there is a presumption that it had existed prior to that time. *Inhabitants of Hingham v. Inhabitants of South Scituate,* 7 Gray (Mass.) 232; *Dixon v. Dixon,* 24 N. J. Eq. 134; *Blank v. Township of Livonia,* 79 Mich. 5, 44 N. W. 157; *Manning v. Insurance Co.,* 100 U. S. 697, 25 L. Ed. 761.

> In *Inhabitants of Hingham v. Inhabitants of Scituate,* supra, Bigelow, J., speaking for the court, said * * * 'We know of no rule of law which permits us to reason in an inverse order and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously.' "

The opinion contains similar quotations from the *Dixon* and *Blank* cases. The Supreme Court of California, in

Windhaus v. Bootz, 92 Cal. 617, 622,

makes, with approval, the same quotation from the Massachusetts case. In *Cerruti Co. v. Simi Land Co.,* 171 Cal. 254, the same court says:

> "Plaintiff's case would seem to depend, therefore, upon a presumption that a present state of facts shown must have been in existence for a long time—a presumption which the law does not recognize. Presumptions do not run backward."

In *Estate of Dolbeer,* 149 Cal. 227, 235, *Henshaw, J.,* speaking for the same court, says:

> "Proof of insanity carries back no presumption of its past existence."

In *McDougald v. S. P. R. Co.,* 9 Cal. App. 236, the court holds that the presumption of continuance of things or conditions shown to exist is "prospective and not retrospective".

It is thus abundantly shown that there is no warrant whatever for the assertion of the District Attorney, or the conclusion of the lower court, that facts occurring "at any time" may be taken as evi-

dence of fraud or that lack of good faith (denominated fraud) in taking the oath of allegiance in 1904 may be inferred from expressions of opinion uttered twelve to fourteen years later. If judgments of courts of justice could be pronounced upon such mere conjectures, what would become of the safeguards which long years of experience have formulated for the protection of civil rights and the orderly administration of justice?

AN INFERENCE CANNOT BE FOUNDED UPON AN INFERENCE.

We have shown that from declarations alleged to have been made in 1916 to 1917 the court *inferred* a then existing lack of allegiance to the United States, and from such inferred lack of allegiance in turn inferred that appellant committed fraud in taking the oath of allegiance twelve to thirteen years previously. Denouncing such process of reasoning as mere conjecture, the Supreme Court of the United States says in

U. S. v. Ross, 92 U. S. 281:

> "It is obvious that this presumption could have been made only by piling inference upon inference, presumption upon presumption * * *. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evidence, p. 80, lays down the rule thus: 'In the first place, as the very foundation

> of indirect evidence is the establishment of one or more facts from which an inference is sought to be made, the law requires that the latter should be established by *direct* evidence as if they were the very facts in issue.' "

The above language is quoted with approval in *Manning v. Insurance Co.* 100 U. S. 693, 698.

The *Ross* case is also cited in *Atchison Co. v. Sedillo,* 219 Fed. 686, 135 C. C. A. 358, the court (citing also other cases to the same effect) quoting from *Chamberlayne's Modern Law of Evidence,* § 1029, as follows:

> "The requirement that the logical inference styled a presumption of fact should be a strong, natural and immediate one brings as a corollary the rule that no inference can legitimately be based upon a fact the existence of which itself rests upon a prior inference."

The *Ross* case is also followed in *Smith v. Pennsylvania R. Co.,* 239 Fed. 103, 151 C. C. A. 277.

It follows that the court was not warranted in founding an inference of fraud in 1904 upon an inference of lack of allegiance in 1916 to 1917.

AMONG CONFLICTING INFERENCES THE PRESUMPTION OF LAWFUL CONDUCT AND INNOCENCE OF FRAUD OR WRONG PREVAILS.

The first and most elementary presumptions of our system of law, paramount to all others, are the presumptions of lawful and honorable conduct and innocence of crime, fraud or wrong and the pre-

sumption of the validity of a judgment. It is unnecessary to dwell on the proposition that he who charges crime, fraud or wrong has the burden of proving such charges, in civil cases by a preponderance of the evidence, and in criminal cases beyond a reasonable doubt. In cases of fraud particularly, and more especially in proceedings for the cancellation of a public grant, to which naturalization is analogous, the rule is universal that the proof must be strong, clear and convincing (*U. S. v. Albertini,* 206 Fed. 133; *U. S. v. Cal. Midway Oil Co.,* 259 Fed. 343, 352).

Now how has the District Attorney undertaken to sustain this burden in the case at bar? How has he undertaken the burden of proving by a preponderance of the evidence and by strong, clear and convincing proof any fraud or lack of good faith in 1904? By any direct evidence of fraud or lack of good faith shown to have then existed? No. By any acts or declarations at or near or prior to that time? No. How then? Let us again quote the District Attorney's own statement of the proof:

> "The acts of appellant proved to have been committed in the years from 1914 to * * * 1918 *cannot be taken but showing* [an inference] a clear [then existing] allegiance to the German Emperor," etc.

Now what are the "acts" in 1914-18, from which "allegiance", as distinguished from expressions of opinion, is thus sought to be inferred? In 1916, prior to the entry of the United States into the

war, appellant published a book containing "a brief and sincere expression of my [appellant's] feelings and opinions, together with indisputable 'facts' regarding the great international struggle now going on in Europe". The judge and the District Attorney both charge that appellant "admits" that his book was intended as "propaganda," as though there were anything wrong in propaganda. Do they really know the meaning of this term? Did not the anti-slavery movement, the prohibition campaign and the woman-suffrage movement constitute propaganda? And were not most vigorous propaganda published and circulated in enormous quantities in behalf of Belgium, France and Great Britain in 1914-1916 by many of our foremost citizens? Were they therefore disloyal? The District Attorney also actually accuses appellant of voluntarily going to the proper authorities, to the District Attorney himself, and asking his opinion as to "whether or not it would be proper to sell the book now that the United States and Germany were at war" (Tr. p. 333). To whom else should appellant more properly have gone for an opinion as to his rights and duty? Furthermore, appellant of his own volition delivered to the District Attorney all the books he had left (Tr. pp. 320, 336). The District Attorney is in error in his statement (p. 11) that appellant offered copies of the book to be read after the United States entered the war. The incident referred to was when witness Jane Ludwig "went there at first," which was March 27, 1917

(Tr. pp. 267, 268). And we are unable to find anything in the record to justify his statement that after we entered the war appellant was planning to reach Germany, either through Mexico or otherwise. The accusation concerning a change of taste for a good cigar is really ludicrous. The expression was used in the course of argument as a "simile" just as (on p. 250) appears, "metaphorically speaking", the exchange of an old coat "for a newer and better one". The District Attorney, after having determined to institute these proceedings, wrote appellant to bring him his certificate of naturalization, which appellant very promptly did (p. 358). Comparison is invited.

The opinion of the court below we would rather refrain from discussing in detail. We conceive it to be far from the calm, dispassionate and judicial discussion which a judicial opinion should be. Many of its charges against appellant are wholly without any evidence to support them. It is based almost entirely on appellant's *ante bellum* book (the evidence of oral expressions being practically dismissed from consideration—Tr. p. 193) and denounces as falsehoods historical statements therein, the real truth as to many of which is yet to be determined by impartial historians, if after this world-wide conflict such ever will be found. And with the judge's statement that "the hatred exhibited in it against Great Britain and the peculiar affection displayed toward 'down-trodden Ireland' are such as are rarely to be found elsewhere than in the heart

of the Hun," we must respectfully disagree. For a hundred years have been heard and read throughout the country the campaign and other threats of "twisting the British lion's tail", and for a hundred years have propaganda been made by some of our best citizens for the freedom of Ireland, during all of which period this country has been a haven of safety for political refugees from Ireland.

For a few of the many commendations of appellant's book "purposely selected * * * from those whose sentiments are decidedly for the cause of the Allies", see transcript, pages 52-58. For an extraordinarily broad and capable, though for the present sordid era a too altruistic, vision and suggestion for permanent peace, see transcript, pages 173 et seq. The good motive which actuated appellant in publishing the book is so apparent that "he who runs may read", notwithstanding that in the light of subsequent events one may disagree with some of appellant's premises. In addition, the law presumes honest motives and good intent. And for appellant's own status toward his adopted country before and after its entry into the war, in addition to the references in our opening brief (pp. 9 to 12), see, regarding appellant's offers of his professional services to the Red Cross, etc., transcript, pages 185 and 186.

But, to return to our argument, is there any evidence in the record of any overt act against the United States at any time? Is there any evidence of any act intended to, or which would or did, give

aid or comfort to its enemies? Is there a particle of direct evidence of acts of disloyalty to the United States? Is it disloyal, when our country is not at war, to have sufficient intelligence to give expressions of opinion as to the justice or injustice of the cause of certain of the belligerents, or as to the justice or injustice of the acts of certain officers of our own government toward one or the other of the belligerents? Is it disloyal, in such case, by means of argument and expressions of opinion and reasoning to endeavor to bring about a reformation? Assuredly not. Where, then, is the evidence of disloyalty?

But suppose we should, without conceding anything, but solely for the sake of argument, assume that lack of allegiance might be inferred from appellant's acts and declarations in 1916-17, and that lack of good faith might therefrom in turn be inferred to have existed in 1904 (surely extremely far fetched), even such inferences would still come in direct conflict with the greater and paramount presumptions of lawful intention and conduct and innocence of crime, fraud or wrong.

> "The presumption of innocence and good faith is one of the strongest, and always prevails over one giving rise to an inference of guilt or bad faith [citing many cases]. Or, as expressed in *West v. State,* 1 Wis. 210, 216, presumptions are 'to be used in the administration of justice as a weapon of defense, not of assault'."
>
> *Coffman v. Christenson,* 102 Minn. 460, 465.

> "Fraud cannot be presumed. The law presumes that every person is honest until the contrary appears, and in this transaction the court must assume that the individual defendants were, in working the transformation, actuated by honesty of purpose. Even though it be held that the defendants' proceedings were in violation of law, it does not necessarily follow that they were fraudulent, or with an improper motive. Men sometimes proceed contrary to law in the best of faith and with the best of motives."
>
> *Shera v. Merchants L. I. Co.,* 237 Fed. 484; *Jones v. Simpson,* 116 U. S. 615.

In *Wilcox v. Wilcox,* 171 Cal. 770, concerning the conflict between the presumption of continuance of a thing shown to exist and the presumption of innocence, the court says (p. 773):

> "But, as was said in *Hunter v. Hunter,* 111 Cal. 261, 267: 'The presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong' * * *. These cases must be taken as establishing it to be the law * * * that the *prima facie* presumption in favor of the validity of the marriage assailed outweighs the presumption of the continuance of life of the former husband or wife."

Judgment reversed.

In *U. S. Ross,* supra, the Supreme Court of the United States held similarly that

> "the presumption that public officers have done their duty is not sufficient to supply the proof of a substantive fact"

essential to sustaining the burden of proof. Judgment for the government was reversed.

> "If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is not warranted. In short, where two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of a corrupt motive, it is the duty of the trier of fact to draw the inference favorable to good faith and fair dealing."
>
> *U. S. v. Cal. Midway Oil Co., supra.*

The above cases refer mostly to conflicting presumptions. Aside from this, an inference, such as is endeavored to be inferred in the case at bar, is infinitely weaker than a presumption, for when an inference comes into conflict with a presumption or with direct controverting evidence, the inference must fall. Here the District Attorney presents nothing more than an inference, a mere conjecture, that appellant lacked good faith in taking the oath of allegiance in 1904. This inference is controverted, not alone by the presumption of innocence of wrong, but also by appellant's direct testimony (p. 287).

> "When I made said oath [of allegiance] I meant every word and syllable of it, and do so now, and I have shown by my acts and actions that I have always meant every word and syllable of that oath."

In the recent case of *Everett v. Standard Acc. Ins. Co.,* 31 Cal. App. Dec. 56, the court says (p. 60):

> "Where evidence is offered controverting the inference which might ordinarily be drawn under the circumstances, the jury is bound to

find according to the controverting evidence. * * * The law presumes that he did not commit bigamy, that he did not commit perjury * * * and that he did not commit fraud when he procured the policy of insurance."

See also *Maupon v. Solomon,* 28 Cal. App. Dec. 1231, rehearing denied by Supreme Court in 58 Cal. Dec. 83, reversing a judgment based solely on an inference, it being contradicted by direct controverting evidence. So, in the case at bar, the District Attorney's inference—if it can be so dignified—of lack of good faith in 1904 is controverted, not alone by direct controverting testimony, but also by the strongest presumptions known to the law, before which the inference must fall.

See also

In re Pusey, 173 Cal. 141;
Estate of Hughson, 173 Cal. 448, 453.

Not one of the cases cited on page 16 of the District Attorney's brief was founded on an inference, or even on a presumption. In each case there was direct testimony as to specific facts or conditions, proven by direct testimony to have existed at the time of naturalization. These cases in reality confirm our claims as to the insufficiency of the evidence here, where no direct testimony of fraud or illegality was produced, in fact, nothing but the merest conjecture as to the state of appellant's mind or intent in 1904.

It thus conclusively appears that the District Attorney has not sustained the burden of proving by clear and convincing proof any fraud committed in 1904, his attempt to do so through inference founded upon inference from other acts alleged to have been committed in 1916-17 failing, for each of the following reasons:

1. Presumptions of continuance of existence are prospective, not retrospective;

2. An inference cannot be founded upon an inference;

3. As between conflicting presumptions or inferences, the presumption of good faith and motive, of compliance with the law, and of innocence of fraud, crime or wrong, as well as of the validity of a judgment or decree, prevail.

Respectfully submitted,

C. H. McBride,
Attorney for Appellant.

S. Joseph Theisen,
Of Counsel.